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**TITLE 329 SOLID WASTE MANAGEMENT DIVISION**

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**FIRST NOTICE OF COMMENT PERIOD**

LSA Document #14-287

**HAZARDOUS WASTE FINANCIAL ASSURANCE****PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment for amendments to rules at [329 IAC 3.1](#) concerning hazardous waste financial assurance. IDEM seeks comment on the affected citations listed and any other provisions of Title 329 that may be affected by this rulemaking.

**CITATIONS AFFECTED:** [329 IAC 3.1-14](#); [329 IAC 3.1-15](#).

**AUTHORITY:** [IC 13-14-8](#); [IC 13-22-2-4](#); [IC 13-22-8-1](#).

**SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING****Basic Purpose and Background**

The rules in [329 IAC 3.1](#) establish standards, procedures, and requirements for Indiana's hazardous waste management program consistent with the requirements of the federal Resource Conservation and Recovery Act (RCRA). The rules contain requirements for the treatment, storage, disposal, and transportation of hazardous waste that apply to generators, transporters, handlers, and owners or operators of hazardous waste facilities.

This rulemaking proposes to make amendments to the hazardous waste financial assurance rules at [329 IAC 3.1-14](#) and [329 IAC 3.1-15](#). These rules have not undergone a comprehensive revision in many years, and many requirements are inadequate for current conditions in the industry. The rules also do not address financial assurance requirements for corrective action despite the authority given to the department in [IC 13-22-8-1](#) to create these requirements. Finally, some sections are repetitive or confusing, and the department plans to improve the clarity and organization of these sections.

The department proposes to make the following changes to the rules:

- Revise the rules and financial assurance mechanisms to account for current conditions in the hazardous waste industry, reflect changes made by other states' regulatory agencies, and ensure that permittees will be able to meet closure and post-closure costs.
- Include requirements for corrective action financial assurance that are consistent with the federal requirements and the closure and post-closure financial assurance requirements in [329 IAC 3.1](#).
- Update the rules to be consistent with the recently adopted changes to the solid waste financial assurance requirements in [329 IAC 10-39](#), including the following:
  - Require compliance with both the financial ratios and bond ratings for the financial test;
  - Require the submittal of more specific financial information for the financial test if the bond rating indicates a potential credit risk;
  - Include a requirement to adjust post-closure costs for inflation during the post-closure period.
- Potentially eliminate some of the financial assurance mechanisms that are not currently used by any of the permitted disposal facilities.
- Eliminate the wording of financial assurance forms in [329 IAC 3.1-14](#) and replace with language indicating the forms to be used shall be provided by the department.
- Reorganize the rules to reduce repetitiveness, improve clarity, and enhance comprehensibility, while still being at least as strict as the federal hazardous waste financial assurance regulations.
- Make other improvements to the hazardous waste financial assurance rules, as they may arise during the rulemaking process.

Those affected by this rulemaking include hazardous waste facilities and corrective action sites that are required to maintain financial assurance. In addition, the department might experience some changes in processes and procedures as a result of the comprehensive changes to the current rules at [329 IAC 3.1](#).

While the proposed changes may increase costs for some regulated entities based on their choice of financial assurance mechanisms, the department has supporting evidence that the changes will provide increased financial security in the event of an accidental occurrence or an owner or operator fails to meet the requirements of closure, post-closure, or corrective action. Recent incidents have suggested that the current requirements do not adequately provide enough financial security for certain types of events. In addition, other states and organizations have determined the current financial assurance regulations are not adequate for current conditions in the hazardous waste industry. IDEM would like to stay consistent with recent changes among industry and other states' regulatory agencies.

IDEM seeks comment on the affected citations listed, including suggestions for specific language, any other provisions of Title 329 that may be affected by this rulemaking, and alternative ways to achieve the purpose of the

rulemaking.

### **Alternatives to Be Considered Within the Rulemaking**

Alternative 1. Make a comprehensive revision of the financial assurance rules, including updating the rule to current financial conditions in the industry, reflect changes made by other states, add corrective action requirements, include changes from recently updated solid waste financial assurance rules, eliminate some financial assurance mechanisms, eliminate the wording for financial assurance forms, and reorganize the rule to improve clarity and reduce repetitiveness.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? Parts of this alternative are imposed by federal law. Indiana has an authorized state hazardous waste program, which must be approved in accordance with Section 3006 of RCRA and comply with the state authorization requirements in 40 CFR 271 Subpart A. In addition, the hazardous waste financial assurance requirements in [329 IAC 3.1](#) must be at least as strict as the federal rules at 40 CFR 264 Subpart H and 40 CFR 265 Subpart H.
- If it is a federal requirement, is it different from federal law? Yes.
- If it is different, describe the differences. The proposed rule changes will differ from the federal law in the following ways:
  - Some requirements for the financial test mechanism and insurance mechanism will be stricter than the federal requirements.
  - The rules will include requirements for the financial assurance of corrective action sites, which are not specified in the federal rules.
  - Some of the minimum financial requirements, such as liability coverage for accidental occurrences, will be increased to a higher amount than the federal rules.
  - The requirement for the adjustment of post-closure costs for inflation during the post-closure period will be stricter than federal requirements.
  - The organization of the rule will be significantly different than the federal rules.
  - The rule changes may eliminate some of the financial assurance mechanisms and the wording for the financial assurance forms that are in the federal rules.

Alternative 2. Update the rule to current financial conditions in the industry, reflect changes made by other states, add corrective action requirements, include changes from recently updated solid waste financial assurance rules, reorganize the rule to improve clarity and reduce repetitiveness, but do not eliminate some of the financial assurance requirements and the wording in the financial assurance forms.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? Parts of this alternative are imposed by federal law. Indiana has an authorized state hazardous waste program, which must be approved in accordance with Section 3006 of RCRA and comply with the state authorization requirements in 40 CFR 271 Subpart A. In addition, the hazardous waste financial assurance requirements in [329 IAC 3.1](#) must be at least as strict as the federal rules at 40 CFR 264 Subpart H and 40 CFR 265 Subpart H.
- If it is a federal requirement, is it different from federal law? Yes.
- If it is different, describe the differences. The proposed rule changes will differ from the federal law in the following ways:
  - Some requirements for the financial test mechanism and insurance mechanism will be stricter than the federal requirements.
  - The rules will include requirements for the financial assurance of corrective action sites, which are not specified in the federal rules.
  - Some of the minimum financial requirements, such as liability coverage for accidental occurrences, will be increased to a higher amount than the federal rules.
  - The requirement for the adjustment of post-closure costs for inflation during the post-closure period will be stricter than federal requirements.
  - The organization of the rule will be significantly different than the federal rules.

Alternative 3. Do not amend [329 IAC 3.1](#).

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? Parts of this alternative are imposed by federal law. Indiana has an authorized state hazardous waste program, which must be approved in accordance with Section 3006 of RCRA and comply with the state authorization requirements in 40 CFR 271 Subpart A. In addition, the hazardous waste financial assurance requirements in [329 IAC 3.1](#) must be at least as strict as the federal rules at 40 CFR 264 Subpart H and 40 CFR 265 Subpart H.
- If it is a federal requirement, is it different from federal law? No.
- If it is different, describe the differences. Not applicable.

### **Applicable Federal Law**

RCRA is the federal law that gives the Environmental Protection Agency and the states the authority to regulate hazardous waste. Subtitle C of RCRA has the requirements specific to hazardous waste. Also, Indiana's

authorized hazardous waste program must comply with the state authorization requirements in 40 CFR 271 Subpart A and be at least as strict as the financial assurance requirements at 40 CFR 264 Subpart H and 40 CFR 265 Subpart H.

### **Potential Fiscal Impact**

Potential Fiscal Impact of Alternative 1. Various aspects of this alternative could have a fiscal impact. The total fiscal impact of this alternative will vary, depending upon the number of regulated entities affected by the rule changes and the costs incurred to each entity. At this time, it is difficult to estimate the exact fiscal impact because financial conditions may change and many regulated entities may improve their financial condition, becoming compliant with the rule before the effective date of this rule.

The financial assurance program for hazardous waste facilities is federally required, and IDEM has the authority to make the rules stricter if IDEM believes the changes are necessary to cover the potential costs of closure, post-closure, and corrective action requirements. The proposed changes described earlier in this notice may increase costs for some owners or operators based on their choice of financial assurance mechanism, but not all owners or operators. IDEM believes these amendments are needed to cover the costs of closure, post-closure, and corrective action requirements, as changes in the industry have made the current financial assurance requirements potentially inadequate.

The changes to the financial test may result in one or more owners or operators not meeting the requirements for the financial test. The owner or operator will be required to obtain a different financial assurance mechanism, any of which have at least a cost in the thousands of dollars per facility.

The increase in minimum liability coverage for facilities will increase the cost of maintaining this coverage. The total amount will vary for each facility and owner or operator.

The addition of an adjustment for inflation for post-closure maintenance costs during the post-closure period of disposal facilities may increase the costs for facilities. The annual cost will depend on the annual post-closure costs for the facility and the annual inflation rate, which could range from a few hundred dollars to thousands of dollars for each owner or operator. If the US dollar experiences a period of deflation, the post-closure adjustment will actually be a cost savings for the owner or operator.

The department may add the discretionary requirement for post-closure beyond the standard 30-year period in rolling 10-year periods. The post-closure cost varies for each facility, and not every facility will be required to have this additional post-closure financial assurance, so it is difficult to estimate the cost at this time. However, the department assumes that the annual cost of an additional period of financial assurance will be similar to the annual cost of the original 30-year period of post-closure financial assurance.

The elimination of the captive insurance option for financial assurance may have a fiscal impact on the owners or operators of facilities that use this option. If the owners or operators do not meet the additional requirements, these owners or operators will be required to obtain different insurance from a non-captive company or a different financial assurance mechanism.

The addition of requirements for corrective action financial assurance may cause an increase in costs for facilities that, in the past, did not have specified requirements on maintaining financial assurance. The cost of financial assurance for each corrective action situation will vary depending on the cost of the corrective action and the selected financial assurance mechanism.

The reorganization of the rules to reduce repetitiveness and improve clarity has the potential to reduce administrative costs for the regulated entities. The intent is to make the rules easier to comprehend, and regulated entities and the department may spend less time verifying compliance with the rules. The exact amount of time and resources saved is difficult to determine at this early stage in the rulemaking.

Potential Fiscal Impact of Alternative 2. The fiscal impact of Alternative 2 will be similar to Alternative 1, with the exception that Alternative 2 does not include the elimination of captive insurance and other financial assurance mechanisms. Without the elimination of these financial assurance mechanisms, Alternative 2 will have a slightly smaller fiscal impact than Alternative 1 for affected facilities because Alternative 2 may allow some owners or operators to keep their current financial assurance mechanism. When a facility has to obtain a different financial assurance mechanism, there are costs associated with that change.

Potential Fiscal Impact of Alternative 3. This alternative will not have a fiscal impact because the alternative will not amend the current rules and add or remove requirements.

### **Small Business Assistance Information**

IDEM established a compliance and technical assistance program (CTAP) under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at:

[www.in.gov/idem/ctap](http://www.in.gov/idem/ctap)

For purposes of [IC 4-22-2-28.1](#), small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:  
Jessica Faust-Hamblin

IDEM Small Business Regulatory Coordinator  
IGCN 1225  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 232-8172 or (800) 988-7901  
ctap@idem.in.gov

For purposes of [IC 4-22-2-28.1](#), the Small Business Ombudsman designated by [IC 4-4-35-8](#) is:

Erik Scheub  
Office of Small Business and Entrepreneurship  
One North Capitol, Suite 600  
Indianapolis, IN 46204  
(317) 232-5679  
ombudsman@osbe.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in [IC 4-4-35-8](#), specifically [IC 4-4-35-8\(9\)](#), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

The Small Business Assistance Program Ombudsman is:

Steven N. Howell  
IDEM Small Business Assistance Program Ombudsman  
IGCN 1301  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 232-8587 or (800) 451-6027  
snhowell@idem.in.gov

#### **Public Participation and Work Group Information**

At this time, no work group is planned for the rulemaking. If you feel that a work group or other informal discussion on the rule is appropriate, please contact Dan Watts, Rules Development Branch, Office of Legal Counsel at (317) 234-5345 or (800) 451-6027 (in Indiana).

#### **REQUEST FOR PUBLIC COMMENTS**

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
  - (2) The submission of suggestions for the development of draft rule language.
- Comments may be submitted in one of the following ways:

- (1) By mail or common carrier to the following address:

LSA Document #14-287 Hazardous Waste Financial Assurance  
Dan Watts  
Rules Development Branch  
Office of Legal Counsel  
Indiana Department of Environmental Management  
Indiana Government Center North  
100 North Senate Avenue  
Indianapolis, IN 46204-2251

- (2) By facsimile to (317) 233-5970. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 233-8903.

- (3) By electronic mail to [dwatts1@idem.in.gov](mailto:dwatts1@idem.in.gov). To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.**

- (4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, in order to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

#### **COMMENT PERIOD DEADLINE**

All comments must be postmarked, faxed, or time stamped not later than August 22, 2014. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Dan Watts, Rules Development Branch, Office of Legal Counsel (317) 234-5345 or (800) 451-6027 (in Indiana).

Nancy King, Chief  
Rules Development Branch  
Office of Legal Counsel

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An [html](#) version of this document.